No. 02-1757

In The
Supreme Court of the United States

WILLIAM C. BOND,
Petitioner,

v.

KENNETH BLUM, SR.; KENNETH BLUM, JR.;
DUDLEY F. B. HODGSON;
MCDANIEL, BENNETT & GRIFFIN;
ADELBERG, RUDOW, DORF & HENDLER, LLC;
WILLIAM SLAVIN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether The Fourth Circuit Properly Affirmed The Grant Of Summary Judgment In Favor Of Respondents On The Ground That The Non-Commercial Use Of An Autobiographical Work As Evidence In A Judicial Child Custody Proceeding To Prove That The Author's Household Was Not A Suitable Home For The Sole Custody Of Minor Children Constituted "Fair Use" Within The Meaning Of 17 U.S.C. § 107.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The named petitioner is identified in the Petition for Writ of Certiorari.

The Respondents are individuals Kenneth Blum, Sr., Kenneth Blum Jr., Dudley F.B. Hodgson and William Slavin, as well as the law firms Adelberg, Rudow, Dorf & Hendler, LLC and McDaniel, Bennett & Griffin (collectively referred to as "Respondents").

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit the following disclosure statement:

Respondents state there are no parent or subsidiary companies to be listed, and there are no parent or publicly held corporations having a direct financial interest in the outcome of the litigation.

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COUNTER-STATEMENT OF THE CASE

Petitioner, William C. Bond (hereafter "Petitioner" or "Bond"), conveniently neglects several significant points in his rendition of this case's history. The autobiographical manuscript at issue in this case, authored by Petitioner and entitled *Self-Portrait of a Patricide: How I Got Away With Murder*, describes how Petitioner carried out a cold-blooded plot to kill his father by beating him to death with a hammer. The manuscript reveals that Petitioner felt no remorse for his crime, and then boasts how he got away with the murder by entering into a plea bargain for temporary insanity for which he was institutionalized for psychiatric treatment and later released. While Petitioner now characterizes his manuscript as a "fictionalized" work, it is undisputed that he murdered his father and, as stated by the Fourth Circuit, "verifiable facts of the murder are consistent with the details provided in the manuscript." Petitioner's Appendix at 6a.[1]

Petitioner's presentation of the underlying facts and his related failure to advise the Court completely and accurately of the contextual circumstances regarding the non-commercial use of the manuscript in the child custody proceeding is both misleading and disturbing. While Petitioner acknowledges that the manuscript was used as evidence in a child custody proceeding involving his wife, Alyson, and her former husband, Petitioner emphasizes that he "was not a party to those proceedings," (Pet. at 3), thereby

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[1] All references to the Petitioner's Appendix shall be hereinafter cited as "Pet. App. _____."

patently seeking to create a misleading impression that its use in the judicial proceeding was somehow inappropriate. In so doing, Petitioner fails to mention that he and Alyson lived together in the same house, that Alyson was seeking sole custody of the minor children and that the manuscript was used for the purpose of providing the custody court with information material to its determination as to whether such a sole custody arrangement was in the best interest of the children.

As found by the Fourth Circuit, which reviewed the district court's summary judgment *de novo*, "[t]he undisputed facts show that the defendants introduced a copy of Bond's copyrighted manuscript into evidence in a state child-custody proceeding to prove that Bond's household would not be a suitable place for the children of Bond's wife." Pet. App. 11a.

In its *de novo* review and affirmance of the district court's decision on the fair use issue, the Fourth Circuit also emphasized that "there is no evidence that this use adversely affected Bond's interest in the copyright." Pet. App. 11a. Additionally, the appellate court stated that, "there is no evidence in the record to indicate that defendants' use of the manuscript was anything more than the presentation of evidence in a child custody proceeding to prove the unsuitability of Bond's [i.e. Petitioner's] home as a place for the children." Pet. App. 11a. Moreover, as the Fourth Circuit concluded, and Petitioner has admitted, Petitioner registered a copy of the manuscript with the Copyright Office "[f]or the sole purpose of preventing further use of the manuscript in the proceedings before the Baltimore City Circuit Court." Pet. App. 8a. Thus, the district court found that "Bond misused the

Copyright Act and that he was motivated by a desire to suppress the underlying facts of his copyrighted work rather than safeguard its creative expression." Pet. App. 22a. Furthermore, in awarding attorneys' fees pursuant to 17 U.S.C. § 505 to Respondents,[2] and while recognizing that frivolousness is not essential to an award of fees, the district court concluded that the fair use question presented by Petitioner's complaint was "not a close one," that his position was "frivolous" and that Petitioner "and others in a position similar to his, should be deterred from bringing meritless actions." Pet. App. 22a. In affirming the district court's attorney fee award, the court of appeals concluded that the district court did not abuse its discretion in reaching these conclusions. Pet. App. 22a.

SUMMARY OF ARGUMENT

Petitioner misstates the holding and analysis of the Fourth Circuit. Contrary to Petitioner's characterization of the Fourth Circuit's decision, the court engaged in a proper analysis under 17 U.S.C. § 107 and did not create a *per se* rule. Moreover, the Fourth Circuit correctly concluded that because the use of the manuscript was noncommercial, Petitioner's failure to present evidence that Respondents' use

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[2] Initially, the district court believed it lacked authority to award fees to the law firm defendants. The law firm defendants appealed this ruling to the Fourth Circuit, which in turn held that the court had such authority. On remand, the district court awarded attorneys' fees under § 505 to the law firm defendants. On May 27, 2003, Bond filed a Notice of Appeal of the district court's award of fees to the law firm defendants.

would harm its potential market was properly considered by the lower courts in its fair use analysis.

THE WRIT SHOULD BE DENIED BECAUSE THE LOWER COURTS CONDUCTED A PROPER ANALYSIS OF THE § 107 FACTORS AND THEIR ANALYSIS IS CONSISTENT WITH THE RULINGS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.

In asking this Court to review this matter, Petitioner suggests that the Fourth Circuit's decision is a "radical departure from and conflicts with this Court's" prior rulings in two respects. Petition at page 5.[3] First, Petitioner contends that the Fourth Circuit did not consider the four, non-exclusive factors stated in 17 U.S.C. § 107, but rather adopted a blanket, *per se* rule that the use of a copyrighted work in litigation always constitutes fair use. Pet. at 5. Second, Petitioner suggests that the lower appellate decision conflicts with this Court's decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), maintaining that *Campbell* prohibits the grant of summary judgment on a fair use question where "there is no evidence in the record concerning the effect of the use on the potential market for or value of the copyrighted work" and where, as here, the challenged use is non-commercial. Pet. at 5.

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[3] All references to the Petition shall be hereinafter cited as "Pet. at _____."

Petitioner's suggestions are frivolous.[4]

A simple turn to the text of the Fourth Circuit's opinion demonstrates that the appeals court considered and assessed each of the four factors set forth in § 107. Indeed, in turning to the question of whether use of the manuscript as evidence in the child custody proceeding was subject to the fair use exception, the Fourth Circuit expressly stated, "[t]o make that determination, we apply the four factors set forth in § 107" (Pet. App 15a), and then went on to assess each of these factors in separate sections of its opinion lettered "A" through "D." Pet. App. 15a- 19a. Simply put, the Court did not adopt any *per se* rule. Petitioner's related suggestion that the Fourth Circuit "confined its analysis to one relevant factor" (Pet. at 7) is also belied by the court's opinion. Moreover, his attempt to analogize the evidentiary use of the manuscript to the situation in *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539 (1985), where

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[4] It should also be noted that Petitioner's presentation of the questions presented does not fairly reflect the nature of the lower court's ruling or the noncommercial nature of the challenged use. Contrary to Petitioner's characterization of the first question he presents, the appeals court did not adopt a *per se* rule. Rather, it applied the non-exclusive four factor analysis set forth in § 107 to the undisputed facts of this case in reaching a fact, case specific decision. Petitioner's characterization of his second question is also potentially misleading because it fails to incorporate the undisputed *noncommercial* nature of the subject use- - a factor that has a direct impact on resolution of the general issue of whether a district court may grant summary judgment on the basis of fair use when there is no evidence of market harm.

Nation magazine wrongfully published without authorization and without compensation former President Ford's unpublished memoirs before they were lawfully published by *Time* magazine, is preposterous.

Petitioner's suggestion that the Fourth Circuit's decision conflicts with this Court's articulation of a proper fair use analysis in *Campbell* is also misplaced.

In *Campbell,* the alleged infringer created and sold approximately 250,000 copies of a commercial parody of the famous song, "Oh, Pretty Woman," twenty five years after the writing and copyright registration of the initial song, despite the fact that the infringer had been denied permission to use the lyrics after offering to pay a license fee for such permission. The district court granted summary judgment for the alleged infringer. The court of appeals reversed the district court's finding that the commercial parody was fair use, believing the lower court "had put too little emphasis on [this Court's statement in *Sony*[5]] 'every commercial use... is presumptively... unfair.'" 510 U.S. at 574. This Court, in turn, reversed the appeals court, noting that the appellate court "ostensibly" applied a presumption and confined its treatment of the fair use analysis to the commercial nature of the use. *Id.* at 583-84.

In reversing the court of appeals' conclusion that the commercial nature of the parody rendered it presumptively unfair, the Court's *Campbell* decision advised that "*Sony* itself called for no hard evidentiary presumption," and that the "court of appeals' elevation

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5 *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

much counter to *Sony* itself as to the long common law tradition of fair use adjudication." *Id.* at 584-85. Here, by contrast, the Fourth Circuit did not confine its fair use analysis to one factor, did not adopt any *per se* rule, and did not simply rule that the noncommercial nature of the evidentiary use of the manuscript was by itself (without regard to other factors) the sole dispositive factor for its fair use finding. Rather, as this Court instructed in *Campbell*, the court of appeals employed a "case-by-case analysis," and explored all four of the statutory factors, weighing the results together in light of the purposes of copyright. *Id.* at 577. In so doing, the court of appeals followed the analytical principles outlined by this Court in the *Sony* and *Campbell* decisions.

Petitioner also suggests that the rulings of the lower courts conflict with *Campbell* because "summary judgment cannot be granted on the ground of fair use where there is no evidence concerning the effect of the use on the potential market for or value of the copyrighted work." Pet. at 5. Petitioner's generalized suggestion is wrong. The question of which party bears the burden of proof as to market effect in noncommercial use cases was considered by this Court twenty years ago in *Sony*. At that time, the Court instructed that where the challenged use of a copyrighted work is noncommercial, the party alleging infringement [i.e. the Petitioner here] must demonstrate "either that the prohibited use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work." 464 U.S. at 452.

The Fourth Circuit correctly followed *Sony's* simple instruction in this case, stating that "[b]ecause the challenged use is noncommercial, Bond [i.e. Petitioner] must demonstrate that the use of the manuscript as evidence in the litigation would harm the potential market for his manuscript." Pet. App. 16a. He did not do so. Petitioner's present suggestion that this long-standing principle was "rejected" (Pet. at 14) by this Court ten years after *Sony* in the 1994 *Campbell* decision (which concerned commercial use) is simply not supported by the *Campbell* decision.

The *Campbell* opinion commented that a silent record on the effect of the parodic song's commercial use upon the potential market for a nonparody, rap version of "Oh, Pretty Woman" would disentitle the proponent of the fair use defense- in *Campbell* to summary judgment. 510 U.S. at 594. That comment, however, like the Court's isolated comment in *Sony* that "every commercial use of copyrighted material is presumptively... unfair...," must be read in the context of this Court's emphasis of the need for a sensitive balancing of interests, as well as the context of the specific circumstances presented in *Campbell.* When viewed in context, it is clear that the comment has no application here. Here, the evidentiary use of the manuscript was clearly noncommercial and there was no prior commercial market for the manuscript. The "Oh, Pretty Woman" song had a twenty five year history of commercial use before its lyrics were borrowed for the subject parody, and, as illustrated by its then sales of almost a half million copies, the parody itself had a demonstrated track record in the market place. This backdrop of commercial use and

demonstrable commercial impact is not present in this noncommercial use case.

In addition to being taken out of context, Petitioner's attempt to turn *Campbell*'s comment regarding the silence of the *Campbell* record into a general rule (applicable to both commercial and noncommercial use cases) that judgment on the basis of fair use can never be granted unless there is evidence in the record concerning the effect of the use on the potential market for the copyrighted work is inconsistent with the basic principle underlying the *Campbell* decision, namely, that hard evidentiary presumptions or inferences (save perhaps verbatim copying of an original for commercial purposes) are not appropriate for the four factor fair use analysis. In this regard, acceptance of Petitioner's argument would in essence result in the practical creation of a presumption of market harm in any noncommercial use and would allow the person challenging the fair use to prevent its reasonable application simply because the lack of (as opposed to evidence of) market harm was not established by the noncommercial user. Such a suggestion is inconsistent with this Court's recognition of a distinction between commercial and noncommercial cases and its related instruction in *Sony* that where a use is for a noncommercial purpose, the likelihood of significant market harm "must be demonstrated." 464 U.S. at 598.

In addition to being at odds with this Court's *Sony* decision and the Fourth Circuit's understanding of the law, Petitioner's position is flatly inconsistent with the post-*Sony* and post-*Campbell* views of the Fifth, Sixth, and Ninth Circuit courts of appeals. *See Veeck v. Southern Building Codes Congress International,*

Inc., 241 F.3d 398, 410 (5th Cir. 2001) ("[w]hen...the use of a copyrighted work is noncommercial, defeating a fair use defense requires 'proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work'"); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001) (quoting *Sony*, stating that "the proof required to demonstrate present or future market harm varies with the purpose and character of the use" and noting that the plaintiffs submitted evidence to show that unauthorized use harms the market for plaintiffs' copyrighted materials); *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1385-86 (6th Cir. 1996) ("The burden of proof as to market effect rests with the copyright holder if the challenged use is of a 'noncommercial' nature.").

CONCLUSION

There is no reason for this Court to grant Petitioner's request. The United States Court of Appeals for the Fourth Circuit properly applied the § 107 four factor "fair use" analysis to the undisputed facts of this specific case. The decision of the Fourth Circuit is not in conflict with any other United States court of appeals but rather is in harmony with decisions elsewhere. The Petition should be denied.

Respectfully submitted,

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